

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

WHITNEY NATIONAL BANK, *
*
Plaintiff, *
*
v. * **CASE NO.: 2:07-cv-415-ID**
*
HIGHWAY SOLUTIONS, LLC; *
MICHAEL C. MARCATO and *
ANNE S. MARCATO, *
*
Defendants. *

Motion to Dismiss, or, Alternatively, to Quash Purported Service

on Defendant Highway Solutions, LLC

Defendant Highway Solutions, LLC (“Highway”) hereby appears for the limited purpose of moving this Court, pursuant to Rule 12(b)(5) of the Federal Rules of Civil Procedure, to dismiss the claims against Highway or quashing that service attempted on Highway as detailed below, and as grounds therefore, states as follows:

This lawsuit was commenced on May 11, 2007 by Plaintiff Whitney Bank against Defendants Highway, Michael Marcato and Anne Marcato.¹ Plaintiff purported to perfect service on Highway by serving the Summons and Complaint by certified mail to the following address: Highway Solutions, LLC c/o Anne S. Marcato Registered Agent, 552 Oliver Road, Montgomery, AL 36117. On May 15, 2007, Bob Mallett signed for and received the Summons and Complaint which was sent to Highway. [Exhibit 1].

Under Rule 4(h) of the Federal Rules of Civil Procedure, a domestic corporation may be served by “delivering a copy of the summons and of the complaint to an officer, a managing or

¹ According to the Court’s records, Defendants Michael and Anne Marcato have not yet been served.

general agent, or to any other agent authorized by appointment or by law to receive service of process...." A domestic corporation is also properly served if service is obtained in a manner consistent with the law of the state where the district court is located. Fed. R. Civ. P. 4(h)(1) and (e)(1). Alabama law similarly recognizes that service upon a domestic company is completed "by serving an officer, a partner (other than a limited partner), a managing or general agent, or any agent authorized by appointment or by law to receive service of process." Ala. R. Civ. P. 4(c)(6).

As shown by the attached declaration of Anne Marcato, Bob Mallett is not an officer or partner of Highway, nor is he a managing or general agent of Highway. [Decl. of A. Marcato]. Furthermore, Highway has never appointed nor authorized Mr. Mallett to receive service of process on its behalf. [Id.]. In fact, Mr. Mallett is not, and never has been, an employee of Highway. [Id.]. As such, the claims against Highway are due to either be dismissed for insufficient service of process, or, in the alternative, the purported service on Highway is due to be quashed.

A similar situation was addressed in *Villafana v. Auto-Owners Ins.*, 2006 WL 3834276 (S.D. Ala. Dec. 29, 2006). *Villafana* involved a dispute over insurance coverage and the plaintiff sought to serve the defendant adjusting company by certified mail sent to the home of the adjuster responsible for adjusting her claim. *Id.* at *1. The defendant adjusting company moved to dismiss for insufficient service or, in the alternative, to quash service, and supported the motion with evidence that the individual adjuster was not an officer or managing agent of the defendant company. *Id.* Because the plaintiff did not controvert this showing by the adjusting company, the Court granted the motion to quash service. *Id.* at *1-*2. *See also Bell v. Integrated Health Services, Inc.*, 2007 WL 274364, *5 (S.D.Ala.2007) (dismissing case for

insufficient service of process where plaintiff attempted to serve a defendant company through a person who was not an employee of the defendant); *Allied Products Corp. v. Thomas*, 2006 WL 2640626, *5 (Ala.Civ.App. 2006) (recognizing that attempted service of process by certified mail which was signed by a person who was not an employee of the defendant corporation nor authorized to accept service on its behalf was insufficient)²; *Rooney v. Southern Dependacare, Inc.*, 672 So.2d 1, 4 (Ala. 1995) (noting that record did not support an inference of proper service where only evidence of service was an individual's signature on the certified mail receipt, and evidence indicated that individual who signed was not an authorized agent to accept service).

Because Plaintiff has not served Defendant Highway in compliance with either the Federal or Alabama Rules of Civil Procedure, the purported service upon Highway is due to be quashed and/or the claims against Highway are due to be dismissed.

WHEREFORE, for the reasons set forth hereinabove, Defendant Highway Solutions, LLC moves the Court to quash the purported service on Highway Solutions, LLC or, in the alternative, to dismiss the Complaint against it for insufficient service of process, and for such other and further relief as the Court deems appropriate in the premises.

/s J. David Martin
 Robert D. Segall (ASB ASB-7354-E68R)
 J. David Martin (ASB-7387-A54J)
 Copeland, Franco, Screws & Gill, P.A.
 444 South Perry Street (36104)
 Post Office Box 347
 Montgomery, Alabama 36101-0347
 Telephone: (334) 834-1180
 Facsimile: (334) 834-3172
 Email: segall@copelandfranco.com
 email: martin@copelandfranco.com

² Rule 4(c)(6) of the Alabama Rules of Civil Procedure have since been amended but in a manner which would not have affected the outcome of *Allied Products*. The changes reflected in the current version of Rule 4(c)(6) would not have had an impact on the outcome of the case.

**COUNSEL FOR DEFENDANTS,
Highway Solutions, LLC
Michael and Anne Marcato**

CERTIFICATE OF SERVICE

I hereby certify that on 4th day of June, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

- **Dennis R. Bailey**
drb@rsjg.com, pk@rsjg.com
- **Bowdy Jerome Brown**
bjb@rsjg.com

/s J. David Martin

Of Counsel

Case 2:07-cv-00415-ID-TFM

SENDER: COMPLETE THIS SECTION

- Complete Items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Highway Solutions, LLC
c/o Anne S. Marcato
Registered Agent
552 Oliver Road
Montgomery, AL 36117

2. Article Number
(Transfer from service lab) _____

- 2811, August 2001

7002 2030 0004 1449 8464

Domestic Return Receipt

Page 1 of 1

Document 6-2

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Bob Marcato

 Agent
 Addressee

B. Received by (Printed Name)

Bob Marcato

C. Date of Delivery
5-15-07D. Is delivery address different from item 1?
If YES, enter delivery address below:
 Yes
 No
07CV 415-21
SAC

3. Service Type

 Certified Mail
 Registered
 Insured Mail
 Express Mail
 Return Receipt for Merchandise
 C.O.D.

4. Restricted Delivery? (Extra Fee)

 Yes

102595-02-M-1540

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

WHITNEY NATIONAL BANK,

*

*

Plaintiff,

*

*

v.

CASE NO.: 2:07-cv-415-ID

*

*

**HIGHWAY SOLUTIONS, LLC;
MICHAEL C. MARCATO and
ANNE S. MARCATO,**

*

*

*

*

Defendants.

*

STATE OF ALABAMA

COUNTY OF MONTGOMERY

Declaration of Anne S. Marcato Pursuant to 28 U.S.C. § 1746

1. I am the Managing Member of Highway Solutions, LLC (“Highway”), an Alabama Limited Liability Company.
2. Based on Court records, Whitney Bank attempted to serve Highway by certified mail addressed to 552 Oliver Road, Montgomery, AL 36117. Bob Mallett signed the receipt.
3. Highway has never employed Bob Mallett. Mr. Mallett was not, on or about May 15, 2007, an officer, partner, managing agent or general agent for Highway. Mr. Mallett is not, and was not on or about May 15, 2007, authorized by law or appointment to accept service of process on behalf of Highway.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this the 4th day of June, 2007.

Anne S. Marcato
Anne S. Marcato